

PUBLIC HEARING

JULY 11, 2012

A public hearing of the Council of the County of Kaua'i was called to order by Jay Furfaro, Chair, Committee of the Whole, on Wednesday, July 11, 2012, at 1:47 p.m. at the Council Chambers, Historic County Building, 4396 Rice Street, Suite 201, Lihu'e, Kaua'i, and the presence of the following was noted:

Honorable Dickie Chang
Honorable Jay Furfaro, Committee Chair
Honorable KipuKai Kuali'i
Honorable Nadine K. Nakamura
Honorable Mel Rapozo (present at 1:50 p.m.)
Honorable JoAnn A. Yukimura

Excused: Honorable Tim Bynum

The Clerk read the notice of the public hearing on the following:

Bill No. 2438 – A BILL FOR AN ORDINANCE TO AMEND CHAPTER 3 OF THE KAUAI COUNTY CODE 1987, AS AMENDED, RELATING TO THE REPRESENTATION OF CLIENTS WITH CONFLICTING INTERESTS BY THE OFFICE OF THE COUNTY ATTORNEY,

which was passed on first reading, ordered to print by the Council of the County of Kaua'i on June 13, 2012, and published in *The Garden Island* newspaper on June 22, 2012.

It was noted that no written testimonies had been submitted.

Mr. Rapozo was noted present at 1:50 p.m.

The hearing proceeded as follows:

Chair Furfaro: Jake, you have a full six (6) minutes, go right ahead.

JAKE DELAPLANE, First Deputy Prosecuting Attorney: Thank you, Mr. Chair. For the record Jake Delaplane; I am the First Deputy Prosecuting Attorney. I wanted to start out by just applauding the Council for this actually being something that is coming up before the Council and deserving of Council attention. As most of you know, during our budget presentation this year, the number one challenge that we listed for both the prior year and for Fiscal Year 2013 was our dealings with the County Attorney's Office and the lack of legal representation that we had been afforded both in the past and prospectively what it is looking like we are getting in the future.

One of the major issues that we have run into is conflict situations, and I think with any sort of Corporation Counsel or any County Attorney throughout the country, you are going to see situations where your County Attorney has conflicts because different departments may have different interests, and that is just sort of the normal course of operations. But what we have seen with our County Attorney here is a refusal to recognize these conflicts of interest, and then when push comes

to shove and the conflict of interest has to be sort of put out there publicly, then it is a long, very slow process to get that conflict representation, and we have seen that over the past two months. Back on April 20 when we did our budget presentation, the County Attorney conflicted out of representation of our office with regard to certain matters, and we actually still do not even have representation, at least we do not have a contract regarding that representation as of today. We did meet with our conflict attorney on Monday, but we were informed at that time that there is no contract in place at least as of Monday. Again, we have not been informed by our conflict attorney that a contract is in place. So two months...we are approaching the three-month mark here with July 20 just around the corner, and that is just way too long. I think that really shows that there is a problem with this process and that it is something that the Council should really take a good, long, hard look at. I do know that based on reading the proposed ordinance that is in front of the Council that the provisions that are there just track the language of the Hawai'i Rules of Professional Conduct, and I actually think that it is appropriate, and I fully support the language that is in there that is proposed in the ordinance. But I do think that it speaks to sort of a sad state of affairs that we have here in the County where we have to take rules that are already in place for our attorneys and put them in our County Code so that it can be enforceable on the County level and not just on the State Office of Disciplinary Counsel level. And so it is unfortunate that it has come to that. I do think that it has come to that and I think that it is necessary. But again, I think that it is a sad state of affairs that we have to do something like that.

The other thing I wanted to bring out just generally, and I am not going to go into all the different specific situations that we have had regarding conflict representation, and we have had a lot of them, and I know a lot of the other County departments have had them as well. I think there have been five already this year that have asked for special counsel, five other departments. Again, this is something that is important that you folks look at, but not only is it the actual problems with the conflicts and how they are handled, but it is also the process by which the special counsel is procured, and I have had firsthand sort of experience with this recently where it seemed strange to me that after a conflict is declared, right, so your attorney says, "I have a conflict, I can no longer represent you." Then that same attorney turns right around and then negotiates the contract for special counsel to represent you. I think that is a very, very odd way of handling this, and that is something that the Council should probably consider looking at. We do have provisions in our guidelines that govern the procurement of professional services that deal with situations where anyone involved in the process of procurement of professional services, if they have a conflict of interest in the matter, then the question is supposed to go to the Director of Finance, and the Director of Finance is supposed to decide who will take that person's place in the procurement process. I can just tell you from personal experience in dealing with this that the Finance Department has not been particularly responsive to our request for clarification on that issue, and the procurement of professional services did move forward by the County Attorney's Office, which, again, I think that any lay person looking at this, if you equate this to looking at a private representation situation, so say you are represented by an attorney out there in the private world and all of a sudden you figure out that attorney has a conflict with me and should no longer represent me. Are you then going to allow that attorney that has a conflict to go out and decide who he is going to hire and what the contract provisions are going to be of the next attorney that you get? I really do not think that anyone thinks that is how it should work, and the way our procurement rules are set up, that is not the way it is supposed to work, but that is the way it is working now. It is just sort of a very strange set up.

I just wanted to bring those things to the attention of the Council. I am not going to go, again, into the specifics of the situation, but I appreciate the opportunity to come in and testify publicly on this today. Thank you.

Chair Furfaro: Okay, Jake, if you could hold on just a second. I want to get some things clarified here, and it is a reminder to all of my colleagues here that this is a public hearing, this is not time for Q&A, okay. I am the author of this bill. I see some of the issues that you have, but at the same time I want to be very clear. When Judge Pyun was our County Attorney, he did not even allow others to become part of the selection committee. In contrast, I am the Procurement Officer for the Council and for Elections. Your point is well taken, and I will, offline, speak to the Procurement Officer for the Administration. But I want to make sure that we understand that the current County Attorney has allowed a selection committee under this guidance, which is the current program, where in the past we had never even gotten that far with two previous County Attorneys, and I just say that in all fairness. Your points, sir, are well taken, and I am going to follow up with the Procurement Officer on the time that it has taken to get you where you need to get, but no more Q&A on those particulars. This is not about your office. This is about...if there is a beef between Planning and there is a beef between Engineering on a bridge and some kind of a planning issue, the County Attorney can only represent one of those parties. It is very important for me to get that clear. This bill that I have introduced is for the purpose that going forward we never find ourselves in this dilemma again. Thank you. Yes?

Ms. Yukimura: Chair, I would like to ask a question to clarify the testimony that has been given.

Chair Furfaro: Fine, let us give a question to the Vice Chair trying to get more clarity on the testimony given. I think I have made my point. This is not targeted on any one department. This is about how do we go forward. Vice Chair, you have the floor.

Ms. Yukimura: Thank you. So Jake, I am just curious as to if there is a conflict of interest and if this bill passes such that the County Attorney is not allowed to represent the office or the person in the County asking for representation, then how do you see the process of procurement working?

Mr. Delaplane: First of all, I believe that under the Rules of Professional Conduct, they are already prohibited from continuing representation. So on a State level, the rules are already in place. The enforcement body of that is the Office of Disciplinary Counsel. If we put this in the Code, it comes back to an enforceable County level as well. But with the...as far as the way the procurement process...the way that should work in a conflict situation is, again, it is actually already provided for, but we are not following it now.

Ms. Yukimura: Please explain to me what that process is.

Mr. Delaplane: Under the rules regarding Procurement of Professional Services, if there is a conflict of interest by anyone involved in the procurement process, the way it reads, it does say anyone in the procurement process, that would include the County Attorney, that would include the Director of Finance himself if a conflict existed there. If anyone has a conflict that is involved in the procurement process, then the Director of Finance is supposed to appoint another appropriate authority to oversee the procurement process. And so that rule is in place; it is just being enforced as of right now. To me, I really do not feel like

there is any need of change to that process itself. I just think that we as a County need to actually start abiding by the rules that we have written on the books.

Ms. Yukimura: Thank you very much.

Chair Furfaro: Thank you, Jake. Is there anyone else that wants to testify on this proposed ordinance? If not, I will...

Ms. Yukimura: Chair, I just want to ask our staff to get the procurement provisions that have been referred to by Jake so that I can actually see it in writing.

Chair Furfaro: I will give you what they gave to me. I have already reviewed the same.

Ms. Yukimura: Okay, very good.

Chair Furfaro: Again, the purpose of this bill is about going forward.

Ms. Yukimura: Yes, I just want to know what the alternative process will be.

Chair Furfaro: We will have that material made available to any Councilmember.

Ms. Yukimura: Thank you.

Chair Furfaro: Jake, thank you for your testimony.

There being no further testimony on this matter, the public hearing adjourned at 2:02 p.m.

Respectfully submitted,


JADE K. FOUNTAIN-TANIGAWA
Deputy County Clerk

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